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No. 85-1209

In the Supreme Court of the United States

OCTOBER TERM, 1985

BERNARD KAHLENBERG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether Section 19 of the Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1621, makes respondent eligible for adjustment of status as an "investor," even though he was not adjudged to be an investor during the period covered by Section 19 and was not an investor at the time his application was acted upon.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-16) is reported at 763 F.2d 1346. The order of the Board of Immigration Appeals (Pet. App. 18-21) and the decision of the immigration judge (Pet. App. 22-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1985. A petition for rehearing was denied on October 18, 1985 (Pet. App. 17). The petition for a writ of certiorari was filed on January 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 8 U.S.C. 1255(a) an alien admitted to the United States may, in the discretion of the Attorney General, have his status adjusted to that of a permanent resident if he is eligible to receive an immigrant visa admitting him for

permanent residence and an immigrant visa is immediately available to him.[1] A non-preference visa applicant (see 8 U.S.C. 1153(a)(7)) is eligible for an immigrant visa if he has obtained a labor certification (8 U.S.C. 1182(a)(14)) or is exempt from certification (8 C.F.R. 212.8(b)). One class of aliens exempt from certification is "investors" who have placed a certain amount of capital into a business in the United States (8 C.F.R. 212.8(b)(4)). See Pet. App. 8-9.[2]

Because of the demand for visas by aliens in preference categories, such as close relatives of United States citizens, non-preference visas became unavailable in June 1978. See H.R. Rep. 97-264, 97th Cong., 1st Sess. 35-36 (1981). In 1981, Congress enacted certain amendments to the Immigration and Nationality Act of 1952 in response to this situation. Section 19 of the 1981 Amendments (95 Stat. 1621) (set forth at Pet. App. 32-33), provided an exception to the numerical limitations for a narrow class of investors, defined as any alien who, on or before June 1, 1978: (1) qualified as a non-preference immigrant; (2) was determined to be exempt as an "investor" from the labor certification requirement; and (3) applied for adjustment of status.

2. Petitioner is a native of Rumania and a citizen of Canada, where he lived for 45 years. The evidence at the deportation hearing showed that petitioner entered the United States in 1976, at the age of 56, as a nonimmigrant visitor for business. In June 1976, petitioner applied for

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[1]The number of these visas available annually is limited. See 8 U.S.C. 1151, 1152.

[2]When petitioner applied for adjustment of status in June 1976, an alien could qualify as an investor if he invested $10,000 in the business. 8 C.F.R. (1976 ed.) 212.8(b)(4). In October 1976, the regulation was amended to make the requirements more stringent. 41 Fed. Reg. 37566.

adjustment of status to that of a lawful permanent resident. Petitioner claimed he was an "investor" on the basis of a $10,000 investment in B&M Holding, Inc., a holding company that owned Pan-Can-Am Floral Associates. Pan-Can-Am lost more than $100,000 and was declared bankrupt sometime in 1979.[3] Thereafter, B&M Holding became dormant and has not conducted any further business. Pet. App. 5, 28; A.R. 30.

In April 1978, petitioner's application for a waiver of excludability, which was a necessary prerequisite to eligibility for adjustment of status, was granted (A.R. 83).[4] In June 1979, petitioner returned to Canada for four days to attend his daughter's funeral, without notifying immigration authorities. On June 20, 1979, petitioner's application for adjustment of status was denied by the INS District Director pursuant to 8 C.F.R. 245.2(a)(3) on the ground that petitioner's departure from the United States constituted an abandonment of the application. Pet. App. 5-6.

In July 1981, an order to show cause was issued alleging that petitioner had remained in the United States longer than authorized (Pet. App. 6). After a hearing, the immigration judge found petitioner deportable and denied petitioner's claim for relief from deportation grounded in his application for adjustment of status (Pet. App. 17-30). Although the immigration judge rejected the District Director's conclusion that petitioner had abandoned the application for adjustment as a result of his four-day trip to Canada (*id.* at

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[3]Petitioner was convicted of six counts of larceny arising out of his dealings with Pan-Can-Am. The Florida District Court of Appeal reversed the convictions on the basis of a fatal variance. The court held that the evidence showed, at most, fraud against corporate creditors, rather than larceny against the corporation. Administrative Record (A.R.) 75-78.

[4]Petitioner was excludable due to prior fraud convictions in Canada (A.R. 89).

26), the judge determined that petitioner did not satisfy the qualifications for adjustment of status as an investor. He held that B&M Holding could not form the basis for investor status because the only employees were petitioner and his wife; that Pan-Can-Am could not establish investor status because it was bankrupt; and that a more recent venture did not constitute a continuing business enterprise deriving from the earlier investment and therefore could not form the basis for the conferral of investor status sought in the application (*id.* at 27-29). Accordingly, the immigration judge concluded that petitioner could not benefit from the provisions of Section 19 of the 1981 Amendments because he lacked an investment that qualified him as an investor (Pet. App. 29).

The Board of Immigration Appeals (BIA) affirmed (Pet. App. 18-21). It agreed with the immigration judge that petitioner did not qualify as an investor at the time his adjustment application was being considered. The BIA also held that, because petitioner had never been found to be exempt from the labor certification requirement, Section 19 of the 1981 Amendments was inapplicable.

3. The court of appeals affirmed (Pet. App. 1-16). The court held that petitioner was required to demonstrate investor status at the time his application was being considered and that the BIA and the immigration judge correctly concluded that he had not done so (*id.* at 12-13). The court also held that Section 19 of the 1981 Amendments did not apply to petitioner because he had not been determined to be exempt from the labor certification requirement prior to June 1, 1978. The court concluded that Section 19 was available only to "those alien investors who had already been granted investor status but were ineligible solely on the basis that visa numbers were unavailable." Pet. App. 14.

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the BIA's decision denying him adjustment of status. He objects to both of the alternative grounds on which relief was denied. Petitioner contends (Pet. 16-18) that the court erred in holding that he had to qualify as an investor at the time his application was considered, rather than at the time he applied, and he contends (Pet. 10-16) that he is entitled to the benefits of Section 19 of the 1981 Amendments even though no determination had been made prior to June 1978 that he was eligible for adjustment of status subject to the availability of an immigrant visa. These contentions were correctly rejected by the court of appeals and the BIA.

1. Petitioner provides little argument in support of his contention that the Attorney General was required to find him to be an investor because he had qualified for that status at the time he entered the country and filed his application, even though he no longer qualified as an investor at the time his application was being considered. Common sense certainly does not support the contention; if Congress determined that it is in the government's interest to grant permanent resident status to persons who are investing in the United States' economy, one would expect the relevant inquiry for the Attorney General to be whether the person is actually making such an investment, not whether he did so for some brief period in the past. Petitioner's position is akin to that of the alien in *INS* v. *Miranda*, 459 U.S. 14 (1982), who sought adjustment of status on the basis of marriage to a United States citizen, but was denied adjustment because the marriage had already dissolved by the time the application was considered.

Petitioner does contend that the court of appeals' decision on this point conflicts with *Gill* v. *INS*, 666 F.2d 390 (9th Cir. 1982). That contention is erroneous for the reasons

stated by the court of appeals (see Pet. App. 13). In *Gill*, the alien had applied for adjustment of status as an investor one day before the prerequisites for investor status were made more stringent (see note 2, *supra*). The BIA and the court of appeals agreed that Gill could be covered by the definition in effect at the time of his application only if he qualified as an investor at the time of application. The court held, however, that the BIA had erred on the facts in concluding that Gill was not "actively in the process of investing" when he applied for adjustment. There was no doubt in *Gill* that the alien was an investor at the time his application was ruled upon (see 666 F.2d at 393), and the court of appeals' decision in that case does not at all suggest that a person without qualifying investments at the time his application was considered would be eligible for adjustment of status simply because he did qualify at the time he applied. See also *Pei-Chi Tien* v. *INS*, 638 F.2d 1324, 1328 (5th Cir. 1981); *In re Ketema*, 18 I. & N. Dec. 266, 267 (1982).

2. Even if petitioner were correct that his 1976 investment in a long-since bankrupt company would qualify him for adjustment of status today, his claim still fails if the court of appeals correctly concluded that Section 19 of the 1981 Amendments is not applicable to him; hence, petitioner seeks review of that ruling also. At the outset, we note that this issue is of very limited significance and of no continuing importance. It concerns a type of grandfather clause that applies to only a discrete class of aliens who were in a specified status on June 1, 1978. Petitioner himself notes (Pet. 11) that Congress believed that only about 500 people would be affected by Section 19. We do not know how many aliens other than petitioner would actually have their immigration status affected by the issue that petitioner has presented to this Court, but the number must be considerably less than 500. In any event, petitioner's contention (Pet. 10-16) that the court of appeals erred in this respect is without merit.

First, the court of appeals' opinion is strongly supported by the language of the statute. The exemption applies to one who "on or before June 1, 1978 * * * *was determined* to be exempt from the labor certification requirement" (95 Stat. 1621 (emphasis added)). It is undisputed that no determination was made concerning petitioner's status as an investor prior to June 1978 or, indeed, prior to the deportation hearing. The court of appeals' interpretation also accords with that of the agency responsible for administration of the statute, whose interpretation is entitled to considerable deference. See, *e.g., United States* v. *Clark*, 454 U.S. 555, 565 (1982); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[5]

Finally, the court of appeals' interpretation is consistent with the purpose of the statute, which was to make adjustment of status available to a class of persons who had been denied adjustment solely because of the unavailability of immigrant visas. Section 19 was designed to benefit aliens who had been found qualified as investors but did not have their status adjusted because no immigrant visa was available to them. Petitioner does not fall into this category; he

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[5]Petitioner relies heavily (Pet. 12-13) on a telex sent by the Commissioner of Immigration and Naturalization that discussed Section 19 of the 1981 Amendments. This telex, which was not raised by petitioner until his rehearing petition and hence was not discussed by the court of appeals, does not support petitioner's interpretation of the statute. The use of the phrase "were qualified" in the telex was not intended to alter the terms of the statute and does not suggest that an applicant for adjustment is in any way exempt from the requirement of Section 19 that there be a determination by the Attorney General of qualification for investor status. The telex recognizes, and we do not dispute, that a person may once have been determined to be an investor and therefore subsequently be entitled to adjustment under Section 19 even if his investment was no longer active. But petitioner has never been determined to be an investor and did not qualify as one at the time of his deportation hearing. Hence, INS regulations clearly provide that he is not eligible for adjustment of status. See 8 C.F.R. 245.1(c)(2) (set forth at Pet. App. 33-34).

has never been found qualified as an investor and does not now so qualify. Therefore, even if there had never been a shortage of immigrant visas, he would not be eligible for adjustment of status. Hence, there is no reason why petitioner should receive a windfall benefit pursuant to the 1981 Amendments.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioner's assertion (Pet. 14) that this result is unjust because he was "induced" to move to the United States in reliance on the investor provision of the immigration laws and otherwise would have remained in Canada is groundless. First, adjustment of status is at the discretion of the Attorney General (see 8 U.S.C. 1255(a)), and therefore petitioner could have had no conceivable basis for relying on a "promise of permanent residency" (Pet. 14). Moreover, petitioner could become eligible to apply for adjustment of status only through a favorable exercise of discretion by the Attorney General, viz., a waiver of excludability that forgave petitioner's prior fraud convictions in Canada.